

1 **LEVI & KORSINSKY, LLP**

2 Adam M. Apton (SBN 316506)
3 Adam C. McCall (SBN 302130)
4 388 Market Street, Suite 1300
5 San Francisco, CA 94111
6 Tel: (415) 373-1671
7 Email: aapton@zlk.com
8 Email: amccall@zlk.com

9 **LEVI & KORSINSKY, LLP**

10 Shannon L. Hopkins (admitted *pro hac vice*)
11 Stephanie A. Bartone (admitted *pro hac vice*)
12 Gregory M. Potrepka (admitted *pro hac vice*)
13 1111 Summer Street, Suite 403
14 Stamford, CT 06905
15 Tel: (203) 992-4523
16 Email: shopkins@zlk.com
17 Email: sbartone@zlk.com
18 Email: gpotrepka@zlk.com

19 *Attorneys for Lead Plaintiff Shimon Hedvat,
20 Plaintiff City of Miami Fire Fighters' and
21 Police Officers' Retirement Trust, and the Class*

22 **UNITED STATES DISTRICT COURT**
23 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**

24 IN RE NUTANIX, INC. SECURITIES
25 LITIGATION

26 Master File No. 3:19-cv-01651-WHO

27 Hon. William H. Orrick

28 **CLASS ACTION**

29 **PLAINTIFFS' MEMORANDUM OF
30 POINTS AND AUTHORITIES IN
31 OPPOSITION TO DEFENDANTS'
32 MOTION TO DISMISS**

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1 **COUNTERSTATEMENT OF THE ISSUES (CIVIL L.R. 7-4(A)(3))**

2 1. Have Defendants met their burden of proof that the Consolidated Amended Class Action
3 Complaint for Violations of the Federal Securities Laws does not plausibly state a securities fraud claim
4 under Section 10(b) of the Exchange Act and Rule 10b-5 promulgated thereunder?

5 2. Have Defendants met their burden of proof that the Consolidated Amended Class Action
6 Complaint for Violations of the Federal Securities Laws does not plausibly allege a claim for
7 "controlling person" liability under Section 20(a) of the Exchange Act?

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INTRODUCTION¹

The Class Period takes place in the midst an industry-wide shift away from hardware products to novel, public cloud-oriented products. At that time, Nutanix was already behind the eight ball because it did not have a public cloud product like many of its competitors who had been marketing products like Amazon Web Services (“AWS”) since 2016. Desperate to catch up, Defendants decided prior to the Class Period during Nutanix’s “planning process” for Fiscal Years 2018 and 2019 to “reallocate” money away from lead generation activities to the research and development (“R&D”) of new cloud-based products. Lead generation is a “**key** component to building pipeline” and refers to *marketing* activities used to educate customers about Nutanix products. Defendants’ end of Class Period admission confirms this was no fraud by hindsight. It was intentional ***fraud by foresight***.

Defendants would like this Court to believe that this case is about nothing more than bad business decisions that later did not pan out. Defendants are wrong. This case is simple. Defendants told the market in every Class Period SEC filing that Nutanix was “increasing” spending on marketing, which Defendants do not dispute is mainly comprised of lead generation, and that “lead-generation activities” were “broaden[ing.]” when, in fact, they had decided long before to keep lead generation spending ***flat.*** As an inescapable consequence, Nutanix’s sales pipeline became “pretty dry” and, according to CWs, by no later than May 2018 it was “very obvious” that the pipeline was depleted.

Pipeline depletion was exacerbated by the complete loss of sales leads from Dell, Nutanix's largest and most important original equipment manufacturer ("OEM") "by far," which had accounted for about 40% of Nutanix's sales leads. According to CWs, in 2017, after Dell acquired VMware (Nutanix's main rival) Dell began providing Nutanix with fewer new leads and, by 2018, was not providing Nutanix with *any* new leads, in violation of the companies' OEM agreement. Dell's Vice Chairman confirmed CW1's account after the first corrective disclosure stating "there is no question about what we lead with...[w]e will provide [Nutanix XC servers], but we will lead with VMware."

¹ All references to “¶” are to the Consolidated Amended Class Action Complaint for Violations of the Federal Securities Laws (the “Complaint” or “AC”). Unless otherwise noted, capitalized terms shall have the same meanings as in the AC, emphasis is added, and internal quotations and citations are omitted. References to “DB” are to Defendants’ motion to dismiss memorandum. References to “Ex.” are to Plaintiffs’ exhibits filed herewith. References to “D.Ex.” are to Defendants’ motion’s exhibits.

1 changed” in the relationship and that “we’ve navigated [the VMware] competition waters really well.”

2 The pipeline also suffered from an undisclosed hiring freeze, attrition at every level within the
 3 sales team, and undisclosed product defects to Nutanix’s “core” technology. Rather than disclose such
 4 issues, Defendants misled investors by telling them Nutanix “significantly increased our sales and
 5 marketing personnel” and touted product quality as a cause of increased demand and customer growth.

6 To conceal Nutanix’s revenue crisis, Defendants engaged in an undisclosed pull-in scheme
 7 whereby they instructed sales personnel to pull in customer orders from future quarters into the current
 8 quarter to meet sales forecasts. According to CWs, Nutanix pulled-in orders in every quarter during the
 9 Class Period. This practice intensified in 2018, coinciding with the loss of Dell leads, when Defendants
 10 told the sales force Nutanix was “significantly behind” on its revenue goals and the need for revenue
 11 was “presented as a pending disaster every quarter.” To induce pull-ins, Nutanix offered customers steep
 12 discounts of 75-80% on hardware and 90% on software. Defendants never disclosed that the purported
 13 positive results they touted were only possible because of Defendants’ undisclosed pull-in scheme.

14 Defendants knew none of their statements were true. CWs corroborated that Defendants were
 15 always informed about the status of Nutanix’s pipeline through weekly internal reports from
 16 Salesforce.com containing granular detail about deals at every point in the sales cycle. The reports
 17 showed that by April or May 2018, the pipeline was “pretty dry.” Pandey and Williams also both
 18 attended quarterly All-Hands meetings with CWs where they personally discussed concerns about
 19 Nutanix’s depleted pipeline, the cessation of Dell leads, product quality issues, and sales execution
 20 issues. Product quality issues and deteriorating performance metrics were also discussed during
 21 Quarterly Business Review (“QBR”) meetings attended by David Sangers, Pandey’s direct report, and
 22 memorialized in Key Performance Indicators (“KPI”) on “dashboard” reports on a Company shared
 23 drive accessible to the Defendants.

24 As a result of Defendants’ fraudulent scheme, Pandey and Williams were able to, collectively,
 25 unload **more than \$30.5 million** of their holdings of Nutanix securities at artificially-inflated prices.

26 Unable to hide from their end of Class Period admissions, Defendants’ Motion relies heavily on
 27 misleading aggregate sales and marketing expense figures to show such expenses were purportedly
 28 reported to investors and increasing. But that elides the point. These figures specify neither quarterly

1 *lead generation* spending (Defendants kept it flat), nor quarterly *sales* hires (Defendants admit was not
 2 on “pace” with growth goals). Defendants’ belated confession was not the result of innocuous spending
 3 “imbalances,” as Defendants say. The alleged fraud was a scheme of systemic misrepresentations fueled
 4 by desperation and personal self-interest. Defendant’s Motion should be denied.

5 FACTUAL BACKGROUND

6 I. DEFENDANTS SECRETLY REALLOCATE SPENDING AWAY FROM CRITICAL 7 PIPELINE GENERATION CAUSING SALES LEADS AND SALES TO PLUMMET

8 Founded in 2009 by Defendant Pandey, Nutanix provides computing solutions, including its
 9 “core” HCI technology. ¶¶57, 61. Nutanix’s HCI solutions economize the various functions of its
 10 customers’ computing needs into a single machine—the server. ¶64. This enables systems to scale out
 11 as needed using servers as building blocks. ¶65. Nutanix offers its solutions either as stand-alone
 12 software or pre-installed on hardware built by its OEMs or Nutanix itself. ¶66. By the start of 2017, the
 13 market had overwhelming moved to a software-only model leveraging public cloud options such as
 14 AWS. ¶¶7, 68. Market analysts found it “critical to Nutanix’s long-run success” to enter the public cloud
 15 space. ¶70. Thus, in June 2017, Nutanix announced it was developing Xi, its public cloud product. ¶71.
 16 In the first quarter of FY2018, Nutanix began offering its products through software-only sales. *Id.*

17 To facilitate its transition to the public cloud, in 2018, Nutanix acquired Minjar, Inc., Netsil, Inc.,
 18 and Mainframe2, Inc., each of which were part of the Company’s foundation for a new public cloud
 19 solution. ¶¶69, 98. In order to develop these new products, Nutanix needed to invest “quite a bit” into
 20 R&D. ¶95. However, because the Company did not have disposable cash to invest, Defendants covertly
 21 “deci[ded]” during the “planning process” to reallocate spending for the upcoming FY2018 and FY2019
 22 period away from lead generation to R&D and admittedly “kept lead generation spend flat.” ¶¶292, 296,
 23 309; D.Ex.18 at 16. Defendants reallocated lead spending despite that “a [k]ey element” of Nutanix’s
 24 “growth strategy” is to “[i]nvest to acquire” new leads by “increasing investment in sales and marketing”
 25 to educate customers about Nutanix products. ¶81. Williams admits that “[l]ead generation spending is
 26 a **key** component to building pipeline.” ¶328. Pandey admits that sales success is comprised of:
 27 “salespeople and ***pipeline spend, the demand gen spend[.]***” ¶¶292, 297.

28 As Defendants revealed at the end of the Class Period, the “magnitude of the shift” away from

1 lead generation spending was “not an insignificant amount[,]” but “tens of millions” of dollars. ¶292.
 2 CWs confirmed the underspend. CW4, observed that lead generation spending for Digital Marketing
 3 remained flat from 3QFY2018 through 2QFY2019. ¶¶53, 96. CW5 corroborated CW4’s account, stating
 4 that during the Class Period, Nutanix insufficiently invested in the development of new global accounts.
 5 ¶¶54, 97. CW1 similarly observed that by summer 2018, 80% of Nutanix’s sales came from 15% of
 6 customers who were mainly *existing* accounts, rather than new leads. ¶¶50, 97.

7 Given the importance of lead generation, Defendants scrutinized Nutanix’s pipeline throughout
 8 the Class Period. CWs 1, 3, 5, and 7 recalled that the pipeline was tracked in Nutanix’s internal
 9 Salesforce.com system, which reports granular sales information at every point in the sales cycle for all
 10 customers—new and existing—for all deals (confirmed and “prospective”), and their status (*i.e.*,
 11 discovery stage, proof of concept). ¶168. Pandey had access to, and received pipeline reports from,
 12 Salesforce.com on a weekly basis. ¶170. Moreover, CW5 personally informed Pandey and Williams
 13 throughout the Class Period about the status of CW5’s new deals because it was Nutanix’s “goal” to get
 14 senior executives in front of customers. ¶167. Indeed, Pandey was known amongst Nutanix employees
 15 and the analyst community as being very “active [] in the sales process.” ¶¶354-57.

16 Defendants’ decision to divert funds away from lead generation negatively impacted Nutanix’s
 17 “bookings, billings and revenue.” ¶292. According to CWs 1 and 3, it was “pretty obvious” from the
 18 pipeline reports in Salesforce.com by April or May 2018 that the Company’s pipeline was “pretty dry”
 19 and in trouble from the lack of credible sales leads. ¶172. Pandey discussed concerns about the
 20 significant decrease in pipeline at every quarterly Class Period All-Hands meeting in FY2018 and
 21 FY2019—all of which he and Williams attended. ¶¶112, 174. Defendants kept lead spending flat, despite
 22 knowing from doing it before in FY2017 that it would be disastrous for Nutanix’s sales. ¶¶351-53.

23 Throughout the Class Period, Defendants concealed from the market that Nutanix had kept lead
 24 generation spending flat and the negative consequences it was having on the pipeline, even in the face
 25 of direct inquiries from market analysts about new lead generation and customer growth. ¶¶184, 227.

26 II. SALES SHRINK FURTHER AS DELL STOPS SELLING NUTANIX PRODUCTS

27 At the beginning of the Class Period, Nutanix’s largest and most important OEM “by far” was
 28 Dell, which offered Nutanix on its Dell XC product line. ¶¶5, 88, 90. Dell’s importance to Nutanix

1 derived in significant part from the OEM agreement that governed their relationship, including
 2 obligations owed when dealing with end-customers. ¶90. CW1 stated that the “rules of engagement” in
 3 the OEM agreement required Dell to sell Nutanix software on Dell XC hardware to Nutanix’s existing
 4 customers and new leads, and Dell could not present competitors’ quotes, including its own. *Id.* Nutanix
 5 relied heavily on Dell because Dell generated at least 40% of Nutanix’s overall sales leads. ¶¶5, 88-89.

6 However, Dell’s relationship with Nutanix turned sour in 2016 when Dell acquired VMware,
 7 Nutanix’s biggest rival. ¶5. Shortly thereafter, Dell began “really pushing” VMware software (Dell’s
 8 VX Rail product) over Dell XC products, in violation of the OEM agreement, causing Nutanix’s sales
 9 leads from Dell to dissipate. ¶¶114-15. In January 2018, Dell changed its compensation structure to
 10 reward Dell salespersons for promoting VMware instead of Nutanix. ¶¶117-18. At that point, Nutanix
 11 stopped receiving *any* new sales leads from Dell. ¶119.

12 Defendants concealed from the market that the Dell relationship had deteriorated and Dell
 13 stopped providing new leads. They told shareholders as late as November 2018 that “in terms of the
 14 competitive landscape, nothing has changed” and that Nutanix expected the Dell relationship to improve
 15 with its shift to a software-only company. ¶¶186, 269. CWs confirmed that Pandey and Williams “knew
 16 exactly” what percentage of Nutanix’s sales and sales leads came from Dell at any given time from
 17 Salesforce.com reports and because they attended quarterly All-Hands meetings where Defendants
 18 discussed it, as well as Dell’s change in compensating its sales people. ¶89. By at least April or May
 19 2018, quarterly All-Hands meeting discussions focused on the inadequate number of new leads
 20 (including from Dell), and that the leads Nutanix had were not sufficiently profitable. ¶¶115-17, 174. In
 21 addition to pipeline reports, Salesforce.com also included a “touch box” where employees, including
 22 CW1, reported violations of the Dell OEM agreement during the Class Period. ¶¶115, 168-73.

23 **III. NUTANIX ADDRESSES ITS REVENUE CRISIS BY SECRETLY PULLING-IN SALES
 24 FROM FUTURE QUARTERS TO MEET QUARTERLY SALES FORECASTS**

25 As a result of reallocating lead generation spending and losing Dell sales, Nutanix year-over-
 26 year revenue growth plummeted—declining from 44% in Q2FY2018 (compared to Q2FY2017, the
 27 Class Period Start) and (1%) in Q3FY2019 (compared to Q3FY2018, the Class Period end). Nutanix’s
 28 customer growth declined for the same period from 14% to 6%. *See Ex. C.* During that time, upper

1 management, including the National Sales Manager, Craig Bumpus, who reported directly to Pandey,
 2 communicated “loud and clear” that Nutanix needed more revenue and instructed salespeople
 3 throughout the Class Period to “pull-in” sales from future quarters to meet forecasts. ¶148. Ordinarily,
 4 this means that the ensuing quarter will be depleted of orders in the pipeline, and the pull-in process will
 5 have to be repeated until it becomes “over-procured.” *Id.*, ¶143.

6 CW1 recalled that every quarter during CW1’s employment, salespersons were pressured to
 7 identify orders that could be “pulled in” to the present quarter and upper management reviewed every
 8 prospective deal in Salesforce.com for the same. ¶¶1444, 148. CW1 confirmed the practice intensified
 9 in 2018 because management told CW1 that the Company was “significantly behind” on its revenue
 10 goals and the need for revenue was “presented as a pending disaster every quarter.” ¶¶145, 148-49. In
 11 CW1’s region, alone, Nutanix secretly pulled in approximately \$3.8mm in two separate quarters in 2018.
 12 ¶145. To effectuate the pull-in scheme, Nutanix enticed customers with steep discounts of up to 75-80%
 13 on hardware and 90% on software. ¶151. CWS confirm that by April or May in 2018, Nutanix had over-
 14 procured and the pipeline was “pretty dry,” which was “very obvious” from Salesforce.com reports and
 15 discussions at “All Hands” meetings. ¶¶147-48.

16 **IV. NUTANIX’S SALES EXECUTION IS HAMPERED BY A HIRING FREEZE,
 PRODUCT DEFECTS, AND EMPLOYEE TURNOVER**

18 **Hiring Freezes and Attrition:** Exacerbating Nutanix’s revenue crisis, sales execution faced
 19 significant undisclosed headwinds throughout the Class Period. Although Defendants told the market
 20 they “significantly *increased* our sales and marketing personnel” every quarter (*e.g.*, ¶211), multiple
 21 CWS confirmed Nutanix secretly implemented hiring freezes of all sales personnel in calendar 2018.
 22 ¶135-36. Moreover, CW7 reported that following a change in management in December 2017, Nutanix
 23 suffered from turnover at every level throughout the sales organization. ¶134. These issues resulted in
 24 insufficient sales personnel to close deals. For example, CW4’s Digital Marketing group had more
 25 money budgeted to it than personnel to use it. ¶136. CW5 confirmed that during the Class Period,
 26 Nutanix chronically understaffed its sales teams for large “global” accounts by 80% as compared to
 27 competitors. ¶137. CWS 4 and 5 also observed that the understaffed sales department lacked the time
 28 for adequate training which, coupled with too many new products, resulted in “general sales readiness”

1 being “poor” and thus declining pipeline ¶141. Defendants confirmed the CW accounts, admitting in
 2 February 2019 that, contrary to their prior statements Nutanix was increasing sales hiring, Defendants
 3 had actually under-hired for all of 2018 (¶291) and “took too much on in terms of new products in 2018”
 4 resulting in a “confused” sales team, where Pandey conceded Nutanix “let chaos reign.” ¶¶142, 293.

5 **Product Quality:** While Nutanix became absorbed with new products, its “core” HCI product
 6 quality suffered as a consequence. ¶101. CW6 recalled that, for example, throughout calendar 2018,
 7 Nutanix’s HCI technology no longer offered “one click upgrades”—a feature that customers demanded
 8 and Nutanix marketed as a competitive advantage. ¶102. HCI quality issues were a significant problem
 9 for Nutanix because 80% of its customers used this “core” product. ¶103. Although Defendants boasted
 10 that Nutanix offered an “unmatched” “consumer-grade experience” (¶200), purported strong growth of
 11 “our core business” (¶265), and alleged success in “adding Nutanix Core customers” (¶271), they knew
 12 that these undisclosed HCI product quality issues were causing Nutanix to lose sales because such issues
 13 were discussed at QBR meetings attended by VPs of Products and Support and COO David Sangster,
 14 Pandey’s direct report, and at every quarterly All-Hands meeting throughout calendar 2018. ¶¶20, 107,
 15 111-12. QBR meetings included a review of KPIs for each business segment reviewable on “dashboard”
 16 reports that contained a unit’s quarterly performance against the prior forecast. ¶¶109-10. *Id.* The KPIs,
 17 dashboard reports, and other materials were stored on a shared drive accessible to QBR attendees
 18 (including CW6), and all Director level employees and above (including Pandey and Williams). ¶111.
 19 On May 13, 2019, Pandey admitted these previously undisclosed “product quality” issues existed at
 20 least “the last six to nine months.” ¶113.

21 V. DEFENDANTS LIQUIDATE THEIR MASSIVE STOCK HOLDINGS

22 Capitalizing on Nutanix’s artificially-inflated stock price, Pandey and Williams, neither of whom
 23 sold any Nutanix securities prior to the Class Period, suddenly dumped 704,500 shares of common stock
 24 and stock options for over \$30.5 million in proceeds. ¶363. Specifically, between December 7, 2017 and
 25 December 20, 2017, Pandey unloaded 104,500 shares of common stock for over \$3.7 million in gross
 26 proceeds—*fifteen times* his yearly salary. ¶¶365-66. Williams unloaded 600,000 stock options in only
 27 four trading days for \$25 million in profits—*seventy to one-hundred times* his 2017 and 2018 salaries.
 28 ¶368. Pandey and Williams sold their shares shortly after Nutanix reached historically-high trading

1 prices and strategically timed such sales to occur immediately following earnings announcements rife
2 with misleading statements that caused artificial increases in Nutanix's stock price. ¶¶367, 370.

The truth was ultimately revealed over two partial disclosures. On February 28, 2019, Nutanix revealed that, contrary to Defendants' prior statements that Nutanix was increasing its investment in sales and marketing and sales hiring, Nutanix did the opposite and actually had an "inadequate marketing spending for pipeline generation and slower than expected sales hiring," causing the Company to issue substantially-lower third quarter guidance. ¶¶288-89. Pandey further admitted that "over the past few quarters, we have not kept pace with our bullish sales hiring goals. This plays a role in our sales pipeline development." ¶291. As a result, the price of Nutanix common stock dropped from \$50.09 per share on February 28, 2019 to \$33.70 per share on March 1, 2019. Then, on May 30, 2019, Defendants revealed that Nutanix's problems were far worse than represented and Nutanix failed to meet its revenue targets as a result of needing to "rebuild our pipeline by doubling down on lead generation and increasing our focus on sales hiring and execution." ¶¶321-22. On this news, Nutanix's common stock dropped from a closing price of \$32.67 per share on May 30, 2019 to \$28.07 per share on May 31, 2019. ¶323. Thereafter, numerous analysts issued downgrades (¶¶324-25), with Morgan Stanley citing competitive pressures, particularly *from Dell*, as one of the key reasons for the downgrade. ¶324. Piper Jaffray remarked that "[i]t is clear this model is unsustainable, requiring massive amounts of spending just to support modest revenue growth, which we believe is attributable to competition" and that "[t]he company continues to struggle with execution[.]" ¶325. Stifel noted that "[c]haos still reigns." ¶325.

ARGUMENT

21 To state a Section 10(b) claim, the AC must allege (1) a material misrepresentation or omission
22 (i.e., falsity), (2) scienter, (3) a connection with the transaction, (4) reliance, (5) economic loss, and (6)
23 loss causation. *In re Atossa Genetics, Inc. Sec. Litig.*, 868 F.3d 784, 793 (9th Cir. 2017).² On a motion
24 to dismiss, all factual allegations must be accepted as true and all reasonable inferences drawn in
25 Plaintiffs' favor. *In re Snap Sec. Litig.*, 2018 WL 2972528, **3-4 (C.D. Cal. 2018).

² Defendants challenge falsity and scienter and, thus, concede the remaining elements.

1 **I. THE COMPLAINT ALLEGES FALSE AND/OR MISLEADING STATEMENTS³**

2 “A statement is misleading...if it would give a reasonable investor the impression of a state of
 3 affairs that differs in a material way from the one that actually exists.” *Berson v. Applied Signal Tech., Inc.*, 527 F.3d 982, 985 (9th Cir. 2008). “Only if reasonable minds could not disagree” as to falsity
 5 “should the district court dismiss under 12(b)(6).” *In re Immune Response Sec. Litig.*, 375 F. Supp. 2d
 6 983, 1021-22 (S.D. Cal. 2005). Rule 10b-5 prohibits telling a “material half-truth[],” *U.S. v. Laurienti*,
 7 611 F.3d 530, 539 (9th Cir. 2010), which is the failure “to state a material fact necessary in order to
 8 make the statements made...not misleading”. *Id.* “Once defendants choose to tout positive information”
 9 they cannot do so misleadingly, and must even disclose “adverse information that cuts against the
 10 positive information.” *Khoja v. Orexigen Therapeutics, Inc.*, 899 F.3d 988, 1009 (9th Cir. 2018). Even
 11 “literally true [statements] can be misleading and thus actionable under the securities laws.” *Cunha v. Hansen Natural Corp.*, 2012 WL 12886194, *3 (C.D. Cal. 2012).

13 **A. False and Misleading Statements Regarding Lead Generation**

14 Nutanix stated in the 2018 10-K that its “marketing program” includes ***lead generation*** activities
 15 and “[t]he ***majority*** of our sales and marketing investment is used to educate our end customers about
 16 the benefits of our solution,” e.g., lead generation. ¶¶80-81; D.Ex. 4 at 43. Defendants ultimately
 17 admitted in the first corrective disclosure that “during our planning process” immediately preceding the
 18 Class Period, they secretly decided to “reallocate[]” funds budgeted for lead generation to R&D and
 19 keep “***lead generation spend flat***” for FY2018 and FY2019. ¶292. Yet, Defendants falsely told investors
 20 in each Class Period quarterly and annual SEC filing that Nutanix had “***increased***” critical spending on
 21 marketing for FY2018 and FY2019. See, e.g., ¶193 (“we have continually ***increased*** our marketing
 22 activities related to brand awareness, promotions, trade shows and partner programs”); ¶¶212, 236, 255,
 23 277 (same); ¶¶189-90, 193, 195, 209, 211-12, 214, 233, 235-36, 238, 252, 255-56, 259, 274, 276-77,
 24 279 (“marketing” efforts “expand[ing],” “increase[ing]” or “continue to” do so); ¶253 (“lead-generation
 25 activities” were “broaden[ing]”).

26 Defendants’ statements were false when made because a reasonable investor would have
 27

28 ³ Due to space limitations, Plaintiffs do not address every false statement herein. For the Court’s convenience, Plaintiffs prepared a chart detailing each alleged false statement, the reasons why it is false, and the applicable supporting scienter facts. See Ex. A.

1 understood statements that Nutanix was “increasing” marketing activities to mean Nutanix was also
 2 increasing the most critical component of marketing—lead generation—when, in fact, this was not true.
 3 *City of Miami Gen. Emples.’ & Sanitation Emples.’ Ret. Trust v. RH, Inc.*, 302 F. Supp. 3d 1028, 1039-
 4 40 (N.D. Cal. 2018) (misleading to represent “inventory investments” increasing when investment in
 5 critical subset of inventory was “negligible”); *In re Quality Sys. Sec. Litig.*, 865 F.3d 1130, 1144 (9th
 6 Cir. 2017) (touting metrics as “growing, compared to previous quarters” actionable where “created an
 7 impression of a state of affairs that differed in a material way from the one that actually existed.”); *Azar*
 8 *v. Yelp, Inc.*, 2018 WL 6182756, *11, *17 (N.D. Cal. 2018) (statements actionable where “inconsistent
 9 with any awareness Defendants had” of adverse trend, *as later disclosed*).

10 *Shenwick v. Twitter, Inc.*, 282 F. Supp. 3d 1115 (N.D. Cal. 2017) is instructive. In *Shenwick*,
 11 Twitter made “positive” statements suggesting “user engagement,” an important metric for Twitter in
 12 attracting advertisers, “was improving.” *Id.* at 1127-28, 1139. That claim is akin to Defendants’
 13 statements regarding “increased” marketing investment. Just as marketing investment is instrumental
 14 for Nutanix to develop its sales pipeline, user engagement was important for Twitter in attracting
 15 advertisers. *Id.* at 1125. The *Shenwick* court found it misleading for Twitter to report positive user
 16 engagement without reporting a key component thereof (DAU) was “*flat* or declining...during the Class
 17 Period.” *Id.* at 1140. Here too it was misleading for Defendants to claim Nutanix “increased” marketing
 18 spending when, in fact, Defendants had kept lead generation flat.

19 Seeing no way around their end of Class Period admissions, Defendants try to change Plaintiffs’
 20 theory into one about the adequacy of Nutanix’s lead generation spend. DB10. But the crux of Plaintiffs’
 21 claim is not whether lead spending was sufficient (it was not). Rather, Plaintiffs’ claim is simple.
 22 Defendants said they were increasing marketing spending—and thus, lead generation spending because
 23 lead generation was a self-described “[k]ey element to [Nutanix’s] growth strategy” (¶252)—when they
 24 were not. Further, the disclosure of quarterly aggregate sales and marketing expense figures do not, as
 25 Defendants contend (DB10), equate to disclosure of the subset lead generation spend. *Shenwick*, 282 F.
 26 Supp. 3d at 1142-43. Similarly, Defendants’ contention that their statements are not false because sales
 27 and marketing expense increased in whole dollars (DB10) is not an apples-to-apples comparison because
 28 it includes, as Defendants concede (DB13), other components. Indeed, “factually accurate” historical

1 data does not immunize other misleading statements. *In re Gilead Scis. Sec. Litig.*, 2009 WL 1561584,
 2 *3 (N.D. Cal. 2009). This is because “the disclosure required by the securities laws is measured not by
 3 literal truth[.]” *Vancouver Alumni Asset Hldgs., Inc. v. Daimler AG*, 2017 WL 2378369 (C.D. Cal. 2017).
 4 Defendants are also wrong because sales and marketing expense (excluding stock-based compensation)
 5 as a percentage of sales for FY2017 and FY2018 was 50% and 51%, respectively. Dkt. 108-2 at 92-93
 6 of 209. Thus, it did **not** increase. Regardless, this factual dispute is premature at this stage. *Livid Hldg.
 7 Ltd. v. Salomon Smith Barney, Inc.*, 416 F.3d 940, 951 (9th Cir. 2005).⁴

8 Defendants’ reliance on *In re Nimble Storage, Inc. Sec. Litig.*, 2016 WL 7209826 (N.D. Cal.
 9 2016) is misplaced. In *Nimble*, defendants diverted sales and marketing expenditures for their
 10 “Commercial” division to their “Enterprise” division but, as the plaintiffs “conceded,” the reallocation
 11 was **disclosed**. *Id.* at *3 n.6, *7. Moreover, unlike in *Nimble*, Defendants here specifically stated that
 12 lead generation spending was “increasing.” There were no similarly specific false statements made in
 13 *Nimble* before defendants disclosed the reallocation. *Compare Id.* at *6 (“continues to *do* investments”)
 14 with ¶193 (“we have continually **increased** our marketing activities related to [lead generation]”).

15 B. False and Misleading Statements Regarding Dell Leads and Demand

16 Despite that Dell was not providing Nutanix **any** new sales leads in calendars 2018 and 2019 and
 17 was promoting its own VMware product, Defendants told investors the opposite. For example, when
 18 asked whether the transition away from hardware would increase business with Dell, Pandey stated
 19 “absolutely, we expect the friction to go down.” ¶186. Similarly, during the November 28, 2018
 20 conference call, Pandey responded to an analyst question regarding whether there had “been any
 21 changes” in the competitive environment that: “in terms of the competitive landscape, nothing has
 22 changed” (¶269) and “we’ve navigated [the VMware] competition waters really well.” *Id.* While the
 23 Salesforce.com pipeline report showed declining sales leads throughout the Class period, Defendants
 24 told investors “[w]e expect continued strong top line growth in the remainder of fiscal 2018” (¶179),
 25

26 ⁴ Defendants’ claim that Plaintiffs did not cite internal reports or detailed enough CW allegations (DB12-
 27 13) to show their statements are false ignores the pipeline reports, which showed zero new leads from
 28 Dell and a massively declining pipeline in 2018 due to Defendants’ decision to keep spending flat and
 institute hiring freezes. Moreover, Plaintiffs’ CW allegations are not “a shared opinion”—they
 corroborate Defendants’ own admissions. Finally, Plaintiffs do not contend Nutanix had a duty to
 disclose the dollar amount spent on lead generation. DB13. Rather, Plaintiffs allege Defendants had a
 duty to be truthful that they were not increasing lead generation as Defendants falsely claimed.

1 “[d]emand for our solution remains strong” ¶220) and Nutanix had a “record number of new
 2 customers.” ¶200). Even the day before Nutanix revised guidance down on February 27, 2019,
 3 Defendants falsely stated, that Nutanix was “seeing a ton of demand for [the Nutanix platform]” and
 4 “[Pipeline is] definitely fairly strong to where we were last year.” ¶285. Such “temporal proximity”
 5 between the misstatement and corrective disclosure supports falsity *RH*, 302 F. Supp. 3d at 1042;
 6 *Gammel v. Hewlett-Packard Co.*, 2013 WL 1947525, *15 (C.D. Cal. 2013) (same).

7 These statements were also materially false when made because Nutanix’s overall pipeline was
 8 significantly declining due to the loss of Dell sales and Defendants’ decision to keep lead generation
 9 spending flat. ¶¶114, 119. Indeed, according to CWS 1 and 3, Nutanix’s Salesforce.com pipeline showed
 10 by April or May 2018 that leads were “pretty dry” and it was “very obvious” there was a problem, which
 11 was discussed at quarterly All-Hands meetings in 2018 and 2019. ¶¶147, 172.⁵ Thus, contrary to
 12 Defendants’ statements, demand was declining, not “strong,” and “friction” with Dell was increasing,
 13 not decreasing, because Dell was violating the OEM agreement by selling its own VMware, which
 14 significantly altered the competitive landscape as Nutanix quickly lost market share to VMware. *Backe*
 15 *v. Novatel Wireless, Inc.*, 607 F. Supp. 2d 1145, 1159 (S.D. Cal. 2009) (claim of “strong demand” for
 16 products misleading where company losing market share to competitors); *Quality Sys.*, 865 F.3d at 1144
 17 (statements about pipeline false where CWS recounted contradictory non-public facts).

18 Defendants also included in every 10-K and 10-Q an identical purported warning that “Dell may
 19 be more likely to promote and sell its own solutions” and “[i]f Dell decides to sell its own solutions over
 20 our products, that could adversely impact our OEM sales and harm our business . . .” ¶¶197, 216, 240,
 21 262, 281. Defendants’ purported risk factors (DB15) were false and misleading because, as explained
 22 above, the risk had already materialized causing a significant sales pipeline decline. *Cutler v. Kirchner*,
 23 696 Fed. Appx. 809, 813 (9th Cir. 2017) (risk factor misleading where it “disclosed a risk in the abstract
 24 by omitting the fact that it had already...come to fruition”); *Snap*, 2018 WL 2972528 at *6 (same).
 25 Relatedly, the PSLRA safe harbor does not apply where defendants repeat “the same language” in their
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⁵ Defendants criticize Plaintiffs for not “quantifying” the precise amount of decline in sales leads from Dell. DB 15. But Plaintiffs did quantify it—Dell was providing *zero* new leads. ¶124.

1 periodic SEC reports. *In re Flowers Foods, Inc. Sec. Litig.*, 2018 WL 1558558, *11 (M.D. Ga. 2018).

2 Relying only on Nutanix’s fiscal 2017 and 2019 financial results, but *omitting fiscal 2018*,

3 Defendants disingenuously argue Plaintiffs’ Dell allegations are “refuted by SEC filings” because Dell

4 revenue purportedly “remained steady with a slight increase.” DB14.⁶ Defendants are wrong—Dell sales

5 decreased from \$104 million in FY2018 to \$86.5 million in FY2019—a 17% decline. *See Ex. C.*

6 Moreover, CW1’s account that Dell provided approximately 40% of sales leads is not, as Defendants’

7 contend (DB14), contradicted by Nutanix’s SEC filings reporting actual Dell sales because not all sales

8 leads translate into sales and not all Dell sales leads translate into Dell sales. Further, Plaintiffs allege

9 that Dell stopped providing *new* sales leads, not that Nutanix did not receive any sales from Dell (*e.g.*,

10 *existing* customers from upgrades and other products).

11 Defendants also incorrectly argue that the CWs were not in a position to know the facts alleged.

12 DB14. But CW allegations are sufficiently pled where, as here, Plaintiffs identify each CW’s title, dates

13 of employment, job duties, and the person to whom they reported. *In re Daou Sys., Inc.*, 411 F.3d 1006,

14 1015-16 (9th Cir. 2005) (sufficient to allege job description, responsibilities, title, and to whom CW

15 spoke); *Maverick Fund, L.D.C. v. First Solar, Inc.*, 2018 WL 6181241, at *11 (D. Ariz. 2018) (same).

16 Defendants’ (incorrect) contention that CW1 has no basis to know about Nutanix’s relationship with

17 Dell because CW1 worked in the Midwest region (DB14-15) is wrong. But, CW1 was required to know

18 the Dell OEM agreement terms because CW1 personally liaised with Nutanix alliance partners and

19 resellers assigned to the Dell account (¶121) and reported Dell’s violations in the “touch box” in

20 Salesfoce.com. ¶173. CW1 also attended quarterly All-Hands meetings where Pandey discussed the

21 declining Dell sales leads and pipeline. ¶117. CW1’s account is corroborated by CWs 3, 5 and 6. *In re*

22 *Zillow Grp., Inc. Sec. Litig.*, 2019 WL 1755293, *5 (W.D. Wash. 2019) (CWs credited where averments

23 “consistent and interlocking”). Similarly, CW4 worked on developing lead generation strategies and

24 thus was in a position to know the status of sales leads from Dell. Defendants’ criticism that because

25 CW4 started in January 2018, CW4 cannot speak to Dell sales leads in 2017 (DB15) is wrong. Dell

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28 ⁶ While Plaintiffs dispute that Defendants may rely on SEC filings not alleged in the AC that were issued after its filing (*see Opposition to Request to Judicial Notice filed herewith*), in any event, the 2019 10-K further supports Plaintiffs’ case.

1 allegedly stopped providing any new leads starting in calendar 2018, right when CW4 started.⁷
 2 Moreover, given the sales cycle is about six months, declining sales leads in mid-2017 would not be
 3 seen until early 2018. ¶82.

4 While Defendants may be correct that Nutanix is not responsible for predicting a competitor's
 5 plans (DB15), Plaintiffs allege facts showing Defendants already *knew* Dell was violating the OEM
 6 agreement because (i) Dell was Nutanix's most important OEM; (ii) Salesforce.com showed the pipeline
 7 was in trouble by April 2018; and (iii) Pandey discussed declining Dell sales leads and lack of new deals
 8 at quarterly All-Hands meetings (¶¶115-17). Thus, Plaintiffs alleged particularized facts demonstrating
 9 when Nutanix stopped receiving new Dell leads (January 2018), and quantified them (*zero*). ¶124.⁸

10 Further, Defendants argue that the increase in Nutanix's revenue and customer-base belies any
 11 argument that sales leads from Dell or other sources declined. DB16. On the contrary, from 2018Q2 to
 12 2019Q3, year-over-year revenue and customer growth steadily *decreased* from 44% to (1%) and from
 13 14% to 6%, respectively. Ex. C. Thus, Nutanix's SEC filings support Plaintiffs' theory. In any event,
 14 this is an issue of fact inappropriately resolved on a motion to dismiss. *Institutional Inv'r's Grp. v. Avaya,*
 15 *Inc.*, 564 F.3d 242, 260 n.31 (3d Cir. 2009) (where "reported financial results are in tension with the
 16 reports of the CWS and analysts...we do not resolve factual disputes--even in [PSLRA] cases").

17 Finally, Defendants' claim that the PSLRA's safe harbor applies (DB16-17) fails because their
 18 statements were not forward-looking or are "mixed" statements under *Quality Sys.*, 865 F.3d at 1142.
 19 See, e.g., ¶202 ("We **have** a full-court press on hiring..." and admitting "headcount shortfall"); ¶¶192,
 20 211 ("We plan **to continue** to invest....We **have** significantly increased....We intend **to continue** to
 21 grow...."). Such statements are not protected. See *Roberti v. OSI Systems, Inc.*, 2015 WL 1985562, **8-

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⁷ Defendants' cases (DB15) are inapposite. See *In re DOT Hill Sys. Corp. Sec. Litig.*, 594 F. Supp. 2d
 28 1150, 1162-63 (S.D. Cal. 2008) (CWS unreliable where alleged job description "too vague," plaintiff
 did not allege job duties and facts came from unreliable "hallway conversations."); *In re Accuray Sec.*
Litig., 757 F. Supp. 2d 936, 943-45 (N.D. Cal. 2010) (CW lacked knowledge of specific contracts at
 issue); *City of Royal Oak*, 880 F. Supp. 2d 1045, 1064-65 (N.D. Cal. 2012) (plaintiff failed to allege
 how problems CWS identified prevented defendant from attaining alleged false projections).

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⁸ Defendants' cases (DB15) are distinguishable. See *In re Mellanox Techs. Ltd. Sec. Litig.*, 2014 WL
 12650991, *17 (N.D. Cal. 2014) (statements not false where falsity premised on "rumors"); *In re Stac*
Elecs. Sec. Litig., 89 F.3d 1399, 1407 (9th Cir. 1996) (risk disclosure warning competition from new
 products sufficient where introduction of competitive product was uncertain). Unlike *Mellanox* and *Stac*,
 Defendants *knew* (as opposed to a mere rumor) that Dell was violating the OEM contract.

1 9 (C.D. Cal. 2015) (“should also *continue* to generate revenues” unprotected); *Mallen v. Alphatec Hldg.*
 2 *Inc.*, 861 F. Supp. 2d 1111, 1126 (C.D. Cal. 2012) (same). The safe harbor is also inapplicable to the
 3 AC’s omissions. *Prodanova v. H.C. Wainwright & Co., LLC*, 2018 WL 8017791, *12 (C.D. Cal. 2018).

4 **C. Defendants’ Undisputed and Undisclosed Pulling-In Scheme Rendered
 5 Their Class Period Statements False and Misleading**

6 Throughout the Class Period, Nutanix secretly instructed salespeople to “pull in” sales from
 7 future quarters to make quarterly forecasts. ¶¶143-44. In CW1’s region, alone, Nutanix secretly pulled
 8 in approximately \$3.8 million in two different quarters in 2018. *Id.* Pulling-in sales, or “draining the
 9 swamp,” was directed by upper management to compensate for Nutanix’s empty pipeline—which was
 10 supposed to be 2.5 to 4 times more than the amount of prospective deals in a given quarter. ¶¶143, 146.

11 Defendants’ surreptitious pull-in scheme rendered their statements attributing Nutanix’s ability
 12 to meet forecasts to purported “strong” demand and customer growth, false and misleading. *See e.g.*,
 13 ¶200 (misattributing positive results to “record number of new customers”); ¶220 (misattributing
 14 “strong” demand and “growth in...billings” to “successfully executing” Nutanix’s “software-defined
 15 business model”), ¶227 (misattributing customer expansion to organic growth), ¶245 (touting “sales
 16 productivity” and “customer repeat purchase multiples” caused by undisclosed pull-ins), ¶265
 17 (misattributing purported positive results to core business growth), ¶285 (touting a purported “ton of
 18 demand...in almost all of our districts”); ¶¶195, 214, 238, 259, 279 (the “increase” in “sales and
 19 marketing” investment responsible for “increase in product revenue” and “increased demand”).

20 By putting Nutanix’s success at issue, Defendants had duty to disclose they were only able to
 21 meet forecasts by engaging in the undisclosed and unsustainable practice of pulling-in future sales. *See*
 22 *Murphy v. Precision Castparts Corp.*, 2017 WL 3084274, *9 (D. Or. 2017), *adopted*, 2017 WL 3610523
 23 (D. Or. 2017) (misleading to tout sales growth “without disclosing that a material portion...resulted
 24 from an unsustainable practice of pulling in sales”); *In re Questcor Sec. Litig.*, 2013 WL 5486762, *14
 25 (C.D. Cal. 2013) (once the cause of financial success at issue, defendant must “disclose information
 26 concerning the source of its success”). Courts have sustained securities fraud claims based on similar
 27 allegations. *Murphy*, 2017 WL 3084274 at *9. In *Murphy*, the defendants touted the company’s “organic
 28 growth” while concealing it “was aggressively pulling in sales, offering discounts, and extending

1 payment options to encourage larger sales.” *Id.* Here too, Nutanix aggressively pulled in sales by
 2 enticing customers with steep discounts. ¶151 (75-80% on hardware, 90% on software). *Murphy* also
 3 noted that the purported “sustainable organic growth” from pull-ins was touted by defendants to show
 4 they were “hitting benchmarks along the way to achieving” a goal. *Id.* at *9, *13. So too here. ¶265
 5 (misrepresenting “results this quarter prove” Nutanix on “solid path to meet our [billings] goal”).
 6 Defendants ***do not dispute*** their statements were false as a consequence of the secret pull-ins, thus
 7 waiving any such challenge. *See Nathanson v. Polycom, Inc.*, 2015 WL 12964727, *1 (N.D. Cal. 2015).

8 **D. False and Misleading Statements Regarding Sales Hiring**

9 Throughout the Class Period, Defendants falsely stated to the market that Nutanix was doing a
 10 “lot of hiring” (¶182), “invest[ing] heavily in the growth of our business” by “expand[ing] our
 11 international sales and marketing presence” (¶190), that it had “significantly increased our sales and
 12 marketing personnel” (¶192) and “ramped hiring to support our growth plans.” ¶225; *see also* ¶¶190,
 13 192-93, 209, 211-12, 223, 235, 256-57, 274, 276, 203. As Defendants would later admit, *contrary* to
 14 their public statements, Nutanix had “not kept pace with our bullish sales hiring goals” throughout the
 15 Class Period (¶291) and thus, “our pipeline targets were further impacted by a shortage of sales reps in
 16 the first half of the fiscal year, resulting in an ***under-spend by several million dollars.***” ¶292.

17 This “severe” (¶300) under-hiring was not merely an oversight, as Defendants suggest. Despite
 18 that “salespeople” headcount was, with lead generation spending, one of the two stated key “inputs” to
 19 Nutanix’s success (¶297), according to CW1 and CW7, Defendants secretly froze the hiring of all sales
 20 personnel during the Class Period. ¶136. CW4 similarly revealed that during CW4’s tenure, the Digital
 21 Marketing group lacked sufficient personnel for the money budgeted to it (¶136) and CW5 stated
 22 Nutanix had to staff sales teams with two people when competitors’ teams had eight or twelve. ¶137.
 23 Contrary to Defendants’ contention (DB12), the AC is sufficiently particularized because it describes
 24 the CWS (¶¶50-56) who were employed in *sales*, quantifies the hiring underspend as “several million

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1 dollars,” and Defendants admit their under hiring of salespeople contributed to pipeline shortage.⁹

2 As stated above, Defendants’ contention that their statements are not false because aggregate
 3 sales and marketing expense increased in whole dollars (DB10) ignores that those figures do not break
 4 out sales personnel salaries and that, as a percentage of revenue, they *remained flat* for FY2017 and
 5 FY2018. Moreover, Defendants’ purported real-time disclosure that Nutanix was facing challenges in
 6 meeting hiring goals is insufficient where, as here, they knew they would not meet hiring goals because
 7 Nutanix implemented undisclosed hiring freezes and attrition.

8 E. False and Misleading Statements Regarding Product Quality

9 With the focus on Nutanix’s newly acquired public cloud products, its “core” HCI technology,
 10 which 80% of customers used, was disregarded and thus sustained quality issues throughout 2018 such
 11 as the lack of previously offered “one click upgrades” marketed to customers as an advantage over
 12 competitors. ¶¶68-79, 102. Pandey *admitted* that Defendants were aware of such “product quality” issues
 13 for “the last six to nine months” preceding the close of the Class Period (since mid-2018), contributing
 14 to lower sales. ¶113. These problems likely occurred even earlier.¹⁰ Thus, Defendants’ statements
 15 touting the purported “record number of new customers” due to “unmatched” “consumer-grade
 16 experience,” (¶200), “strong” purported “demand for our solutions” (¶220), purported strong growth of
 17 “our core business” (¶265); and alleged success in “adding Nutanix Core customers” (¶271) were false
 18 when made because demand and customer growth were declining due to product quality issues.

19 Defendants’ only argument is their contention that CW6 cannot speak to events occurring before
 20 CW6 started in June 2018. DB13. But they do not dispute that CW6 knew product quality issues
 21 persisted “throughout 2018.” *Compare id., with* ¶¶101, 201, 221, 266, 268, 272, 286, 310. Thus,

23 ⁹ Defendants’ cases (DB12) are distinguishable. *See Coble v. Broadvision Inc.*, 2002 WL 31093589, at
 24 *11-12 (N.D. Cal. 2002) (no falsity where, unlike here, defendants did not represent they “would
 25 increase its staffing,” only that they “expected an increase in *average* headcount” and discounting hiring
 26 freeze allegations because, unlike here, the CW was only identified as a “former employee,” not alleged
 27 to be employed at the relevant time or alleged to know the relevant facts); *McGovney v. Aerohive
 Networks, Inc.*, 367 F. Supp. 3d 1038, 1056 (N.D. Cal. 2019) (no falsity where “sales personnel issues”
 disclosed and staffing problems based on “vague” allegations, unlike here where CWs provide specific
 examples of under hiring that negatively impacted sales).

28 ¹⁰ *See Iowa Pub. Emples. Ret. Sys. v. MF Global, Ltd.*, 620 F.3d 137, 143 n. 13 (2d Cir. 2010) (dismissal
 because misconduct was alleged in February 2008, but not July 2007, reversed because “[t]his
 conclusion fails to draw a reasonable inference in the plaintiffs’ favor” and the existence of a problem
 at one time “may support an inference that it was present six months earlier”).

1 Defendants concede the falsity of statements made during CW6's employment. Further, Defendants
 2 cannot contest the truth of CW6's averment on a motion to dismiss, that CW6 knows Nutanix's product
 3 quality began deteriorating in 2018. ¶101. *See Petrie v. Elec. Game Card, Inc.*, 761 F.3d 959, 966 (9th
 4 Cir. 2014). This is especially so given CW6's knowledge from receipt of detailed "dashboard reports"
 5 and personal attendance at every quarterly QBR meeting. ¶111.¹¹

6 I. THE COMPLAINT PLAUSIBLY ALLEGES A STRONG INFERENCE OF SCIENTER

7 Plaintiff must "state with particularity facts giving rise to a strong inference that the defendant
 8 acted with the required state of mind." 15 U.S.C. §78u-4(b)(2)(A); *Tellabs, Inc. v. Makor Issues &*
Rights, Ltd., 551 U.S. 308, 314 (2007). Plaintiffs need not allege Defendants "*actually knew*" they were
 10 making false statements. *In re VeriFone Holdings, Inc. Sec. Litig.*, 704 F.3d 694, 708 (9th Cir. 2012)
 11 (emphasis in original). Recklessness is sufficient. *Lloyd v. CVB Fin. Corp.*, 811 F.3d 1200, 1208 (9th
 12 Cir. 2016) (defendants "on notice of facts" supporting recklessness). "An actor is deliberately reckless
 13 if he had reasonable grounds to believe material facts existed that were misstated or omitted, but
 14 nonetheless failed to obtain and disclose such facts although he could have done so without extraordinary
 15 effort." *Hatamian v. Advanced Micro Devices, Inc.*, 87 F. Supp. 3d 1149, 1162 (N.D. Cal. 2015). The
 16 scienter analysis requires facts to be "**taken collectively**." *Tellabs*, 551 U.S. at 310. A scienter inference
 17 is "strong" if it is "at least as likely as any plausible opposing inference." *Id.* at 324, 328-29. "[T]he tie
 18 goes to the Plaintiff." *In re Amgen Inc. Sec. Litig.*, 2014 WL 12585809, *8 (C.D. Cal. 2014).

19 **Defendants' Admissions Support Scienter:** Defendants admitted actual knowledge of most of
 20 the facts underlying Plaintiffs' claims. Williams conceded in the first corrective disclosure that although
 21 "lead generation spending is a **key** component to building pipeline," he and Pandey "reallocating" such
 22 spending *ex ante* based their "decision" during the "planning process." ¶¶292, 309; *c.f. S. Ferry LP # 2*
v. Killinger, 687 F. Supp. 2d 1248, 1259 (W.D. Wash. 2009) (finding scienter where defendant admitted
 23 "we did not complete integration...because we **decided** at the time" on a course of action inconsistent
 24 with their statements). The amount of the reallocation was admittedly "not an insignificant amount," it
 25

27
 28¹¹ The CW statements in *In re NVIDIA Corp. Sec. Litig.*, 768 F.3d 1046, 1061-62 (9th Cir. 2014) (DB13)
 were not cited for their knowledge of particular facts as alleged here, *e.g.*, deteriorating product quality
 as measured by quantifiable metrics such as KPIs and NPS. Rather, they consisted of general aspersions
 on the defendants' character and recollections of bad acts. *Id.* at 1061.

1 was “tens of millions.” ¶292. Defendants’ hiring freeze was also admittedly “an under-spend by several
 2 million dollars.” ¶331. Pandey also conceded that Defendants chose to “let chaos reign” in the “first half
 3 of ’18” such that lapses in employee training “affected demand gen.” ¶¶335-36. Further, over the “six
 4 to nine” months preceding May 2019, Pandey admittedly knew of HCI “product quality” issues. ¶315.
 5 Admissions contradicting earlier misstatements support scienter. *Thomas v. Magnachip Semiconductor*
 6 Corp., 167 F. Supp. 3d 1029, 1043 (N.D. Cal. 2016); *Middlesex Ret. Sys. v. Quest Software, Inc.*, 527
 7 F. Supp. 2d 1164, 1189 (C.D. Cal. 2007) (“a later statement may suggest that a defendant
 8 had...knowledge of the falsity of his statement, if the later statement directly contradicts or is
 9 inconsistent with the earlier statement”); *In re JDS Uniphase Corp. Sec. Litig.*, 2005 WL 43463, *3, *9
 10 (N.D. Cal. 2005) (“later admi[ssion]” that defendant knew “financial difficulty” demonstrated scienter).

11 **Internal Reports and Meetings Support Scienter:** Defendants knew that the Company’s sales
 12 pipeline and sales were dissipating from conversations with employees, meetings and internal reports.
 13 Four CWs in multiple locations, spanning multiple levels within the Company, confirmed that
 14 Defendants had access to Salesforce.com, which tracks pipeline, customer leads, and information about
 15 every customer (existing or prospective) “at any point in the sales cycle.” ¶168.¹² *Quality Sys.*, 865 F.3d
 16 at 1145 (“statements . . . reported by [CWs] with sufficient reliability and personal knowledge must
 17 themselves be indicative of scienter”); *In re Countrywide Fin. Corp. Sec. Litig.*, 588 F. Supp. 2d 1132,
 18 1186 (C.D. Cal. 2008) (strong inference of scienter where, as here, CWs “spanned levels of [the
 19 company’s] hierarchy and geographic origin, where the accounts remained consistent over time.”).

20 CWs confirmed reviewing pipeline reports daily and Defendants’ access to and receipt of those
 21 reports. ¶170. Salesforce.com tracked both quantitative and qualitative data. ¶173 (employees reported
 22 Dell issues in a “touch box”). CWs 1 and 3 confirmed that Salesforce.com evidenced the pipeline
 23 declining in 2017 and that by April or May 2018 it was “pretty dry.” ¶172. *Quality Sys.*, 865 F.3d at
 24 1145 (finding strong inference of scienter where “reports and sales forecasts **through the Salesforce**
 25 **software**” showed trends “available to executives”). Moreover, Pandey and Williams were both present
 26 at “every” quarterly All-Hands meeting where they personally discussed “the percentage of sales and
 27 leads from Dell, Nutanix’s declining sales pipeline,” that “there were not enough new deals in”

28 ¹² Defendants misrepresent that only CW5 had “any contact with...Pandey and Williams.” DB18. Not so—CW1 and CW6 also had direct contact at the All-Hands meetings. ¶¶112, 115.

1 Salesforce, and that the new opportunities “were not of sufficient monetary value[.]” ¶¶89, 112, 115,
 2 347. Thus, Plaintiffs allege more than Defendants’ “mere access” to reports. DB19-20. Regardless, that
 3 the reports “were available to executives” permits a scienter inference in Plaintiffs’ favor. *Quality Sys.*,
 4 865 F.3d at 1145. Further, where, as here, Defendants “personally attended meetings” where pertinent
 5 issues were discussed, scienter is satisfied. *In re Extreme Networks, Inc. Sec. Litig.*, 2018 WL 1411129,
 6 *28 (N.D. Cal. 2018); *In re Intuitive Surgical Secs. Litig.*, 2014 WL 7146215, *5 (N.D. Cal. 2014).

7 Defendants’ “access” to KPIs, dashboard reports, and review materials discussing HCI product
 8 quality issues (¶¶107-12) further supports scienter. *Turocy v. El Pollo Loco Hldgs., Inc.*, 2017 WL
 9 3328543, **16-17 (C.D. Cal 2017); *Rihn v. Acadia Pharm. Inc.*, 2016 WL 5076147, *9 (S.D. Cal. 2016).
 10 That Pandey’s direct report, COO Sangster, attended QBR meetings discussing the HCI issues also
 11 supports scienter. ¶349; *Robb v. Fitbit Inc.*, 2017 WL 219673, *6 (N.D. Cal. 2017) (reports to COO
 12 regarding issues affecting “basic functioning of products” supported holistic scienter analysis even
 13 though complaint did “not contain express allegations that COO” told defendants).

14 While Defendants demand that the specific contents of every report be pled in exacting detail,
 15 that is not required. *Intuitive Surgical*, 2014 WL 7146215, at *5 (“the Ninth Circuit does not appear to
 16 require the contents of the report to be alleged”); *Robb*, 2017 WL 219673, at *8 (same); *Emps. ’ Ret. Sys.
 17 of Gov’t of the Virgin Islands v. Blanford*, 794 F.3d 297, 301, 307 (2d Cir. 2015) (crediting witness
 18 allegations and reversing dismissal based on lacking specificity).¹³ Plaintiffs allege sufficient detail
 19 about the reports, including subject matter (sales and pipeline), the data therein (customer, deal status
 20 and deal value) and that they showed the pipeline was declining and when. Nothing more is required.

21 **Defendants’ Past Practice Supports Scienter:** Defendants were aware of the impact that
 22 diverting investment away from lead generation would have on Nutanix’s pipeline, and ultimately sales,
 23

24 ¹³ Defendants’ cases miss the mark. In *Police Ret. Sys. v. Intuitive Surgical, Inc.*, the court gave “little
 25 weight” to CW testimony that required the court to “string[] together these various witnesses’
 26 statements” to find scienter where several CWs “were not employed at Intuitive” throughout and, in
 27 some cases, at all during the class period. 2012 WL 1868874, *20 (N.D. Cal. 2012). Here, the CWs were
 28 employed throughout the crucial points in the Class Period and CWs 1 and 5 were employed through all
 but one month of the Class Period. Defendants only argue (incorrectly) that CWs 4 and 6 were not in a
 position to know of sales leads from 2017 because they started in 2018, but their accounts are not even
 necessary to establish Pandey and Williams’ participation at All-Hands meetings. See ¶¶89, 115, 347
 (citing CW1’s testimony). In *Wozniak v. Align Tech., Inc.*, only the CEO was named as an individual
 defendant, and he was not alleged to have attended meetings. 2011 WL 2269418, *12 (N.D. Cal. 2011).

1 because they had utilized the same strategy in the past. ¶351. The results were so ruinous that Defendants
 2 admit they “woke up” in 2017, and had to increase lead spending by 75%. *Id.* Despite this recent
 3 experience, Defendants reallocated lead generation spending again during the Class Period. The
 4 similarity of the prior conduct to what is alleged in the Complaint establishes a pattern that supports a
 5 strong inference of scienter. *Reese v. Malone*, 747 F.3d 557, 571 (9th Cir. 2014) (that defendants made
 6 statements “[i]n the wake of a crisis that has the potential to repeat itself” evidenced scienter).

7 **Pandey’s Active Participation/Core Operations Supports Scienter:** Pandey and Williams
 8 were aware of Nutanix’s declining sales pipeline because, by Defendants’ own admissions, they
 9 “regularly monitor billings . . . to help us evaluate our growth . . . and identify trends in our sales
 10 activity.” ¶354; D.Ex.1 at 26. As Chief Operating Decision Makers they concededly “assesse[d]
 11 financial performance based upon discrete financial information at the consolidated level.” ¶¶43-44. See
 12 *Glazer Capital Mgmt., LP v. Magistri*, 549 F.3d 736, 746 (9th Cir. 2008) (“specific admissions from top
 13 executives that they are involved in every detail of the company and that they monitored portions of the
 14 company’s database are factors in favor of inferring scienter....””). Multiple CWS and analysts confirm
 15 Pandey was “active [] in the sales process,” “very hands-on,” regularly attended customer sales pitches
 16 and received detailed pipeline briefing from individuals like CW5. ¶¶167, 303, 355. Further, Pandey
 17 frequently responded to analyst questions regarding the pipeline and, thus would have had to inform
 18 himself of its contents prior to speaking. *See e.g.*, ¶¶184, 227-28.¹⁴ *See S. Ferry LP # 2*, 687 F. Supp. 2d
 19 at 1259 (confident responses “in the face of direct questioning” from analysts supported scienter); *In re*
 20 *Urban Outfitters, Inc. Secs. Litig.*, 103 F. Supp. 3d 635, 653 (E.D. Pa. 2015) (citing *Avaya*, 564 F.3d at
 21 270 n. 43) (omissions in response to analyst questions evidenced scienter).

22 On these facts, it would be “absurd” for Defendants to claim lack of knowledge. *See Brendon v.*
 23 *Allegiant Travel Co.*, 2019 WL 4255051, *7 (D. Nev. 2019) (“absurd” to suggest no knowledge where
 24 the “10-Ks (signed by [defendants]) stated that management closely supervises all maintenance
 25 functions” and defendants “responded to at least one [analyst] question...suggesting they were familiar

26
 27 ¹⁴ Defendants’ cases (DB20 & n. 3) are inapposite as none involved facts where, as here, the CEO
 28 admitted to monitoring sales, had access to reports showing sales declines, and had meetings discussing
 pipeline decline. *In re Autodesk, Inc. Sec. Litig.*, 132 F. Supp. 2d 833 (N.D. Cal. 2000) (no CWS alleged
 to show basis of knowledge); *Zucco Partners, LLC v. Digimarc Corp.*, 552 F.3d 981 (9th Cir. 2009)
 (signing SOX certifications insufficient); *Juniper*, 880 F. Supp. 2d at 1068 (officer position insufficient).

1 with the...issues."); *Shenwick*, 282 F. Supp. 3d at 1146 ("absurd for [defendants] not to have been aware
 2 of adverse DAU trends" where DAU was "integral" to the company's growth and "monitored closely");
 3 *Evanston Police Pension Fund v. McKesson Corp.*, 2019 WL 5587311, *11 (N.D. Cal. 2019) (where
 4 defendants touted "intimate knowledge" of generic drug pricing, "it was at least deliberately reckless
 5 not to investigate the accuracy of their statements"); *Questcor*, 2013 WL 5486762 at *19 (same).¹⁵

6 **Defendants' Stock Sales Support Scienter:** When determining whether insider sales are
 7 probative of scienter, courts consider the following factors: "(1) the amount and percentage of shares
 8 sold by insiders; (2) the timing of the sales; and (3) whether the sales were consistent with the insider's
 9 prior trading history." *No. 84 Employer-Teamster Joint Council-Pension Tr. Fund v. Am. W. Hldg. Corp.*, 320 F.3d 920, 938 (9th Cir. 2003). No one factor is outcome determine. *Id.* Defendants' stock
 10 sales here are highly suspicious and strongly support scienter.

11 **Pandey:** In less than two weeks, Pandey, who had *never previously sold a single share*
 12 of Nutanix stock, rapidly unloaded 104,500 shares, or 35.2% of his total common stock holdings, for
 13 gross proceeds of over \$3.7 million, or *fifteen times* his annual salary. ¶¶365-66. Rapid sales of this
 14 magnitude support an inference of scienter. *See, e.g., In re Supreme Specialties, Inc. Secs. Litig.*, 438
 15 F.3d 256, 278 (3d Cir. 2006) (sales over four times annual salary supported scienter); *Am. W. Hldg.*, 320
 16 F.3d at 940 ("flurry" of insider trading over three-months suspicious); *Questcor*, 2013 WL 5486762, at
 17 *18 (almost no sales in prior 18 months evidence of scienter for class period sales); *Azar*, 2018 WL
 18 6182756, at **18–19 (sale of 20% of supports scienter); *Batwin v. Occam Networks, Inc.*, 2008 WL
 19 2676364, **14-15 (C.D. Cal. 2008) (sale of 7% sufficient).

20 Further, Pandey strategically timed his sales to occur only one week after the Q1 2018 earnings
 21 announcement, which led to an artificial 10% increase in Nutanix stock price, enabling Pandey to sell
 22 his stock during historically-high trading prices as of that time. ¶¶366-67. *Am. W. Hldg.*, 320 F.3d at 939
 23 (sales made while company was making "optimistic statements" suspicious); *Questcor*, 2013 WL
 24 5486762, at *17 (sales made after jumps in stock price due to company announcements raise
 25

26
 27 ¹⁵ The alleged departures of four executives in sales or product development immediately following the
 28 corrective disclosures (¶¶358-61) further supports scienter. *See In re UTStarcom, Inc. Sec. Litig.*, 617 F.
 Supp. 2d 964, 975-76 (N.D. Cal. 2009); *In re Adaptive Broadband Sec. Litig.*, 2002 WL 989478, *14
 (N.D. Cal. 2002) ("[c]orporate [r]eshuffling" supports scienter).

1 suspicious).¹⁶ In fact, Pandey’s December 20, 2017 sales occurred only two days after Nutanix reached
 2 its then historically-high closing price of \$36.57, on December 18, 2017. *Am. W. Hldg.*, 320 F.3d at 939
 3 (“troubling” to the court that insiders sold “near the stock’s peak”). While Defendants argue these sales
 4 were not suspicious because Nutanix’s stock closed at a higher price three months later, “the Ninth
 5 Circuit does not require that insiders sell at the absolute highest point to raise a strong inference of
 6 scienter—it is enough that the insiders traded in such a way as to indicate they took advantage of their
 7 false statements.” *Questcor*, 2013 WL 5486762, at *17 (*citing Daou Sys.*, 411 F.3d at 1024 (insider sales
 8 at \$22.68 when class period high reached over \$34 probative of scienter)).¹⁷

9 Moreover, Defendants’ contention that Pandey lost \$369 million through retained shares (DB23)
 10 does not negate scienter. *Buttonwood Tree Value Partners, LP v. Sweeney*, 2012 WL 13026910, *2
 11 (C.D. Cal. 2012). In making this argument, Defendants fail to account for Pandey’s cost basis and that
 12 he only retained 192,512 shares of stock by the end of the Class Period—a significant decrease from the
 13 297,012 shares he owned at the start. Thus, unlike *Applestein v. Medivation, Inc.*, 861 F. Supp. 2d 1030
 14 (N.D. Cal. 2012) (DB23), Pandey held less stock at the end of the class period.¹⁸ Further, “a 10b5–
 15 1 trading plan does not provide an absolute defense. Rather, it requires an “additional factual finding of
 16 good faith.” *Stocke v. Shuffle Master, Inc.*, 615 F. Supp. 2d 1180, 1193 (D. Nev. 2009); *Questcor*, 2013
 17 WL 5486762, at *16) (“10b5–1 trading plan, without more, is insufficient to negate the effect of
 18 otherwise suspicious sales.”). Defendants’ reliance on the 10b5-1 plan has been repeatedly rejected
 19 where, as here, the Form 4 does not state when the plan was entered into, making it impossible to
 20
 21

22 ¹⁶ Defendants’ cases (DB22) are inapposite. See *In re Vantive Corp. Secs. Litig.*, 283 F.3d 1079, 1094–
 23 96 (9th Cir. 2002) (sales in first month not suspicious where no other defendant sold until two months
 24 later), abrogated on other grounds recognized by *South Ferry LP, No. 2 v. Killinger*, 542 F.3d 776, 784
 25 (9th Cir. 2008) (*Tellabs* “suggests that perhaps *Silicon Graphics*, *Vantive*, and *Read–Rite* [DB13] are
 26 too demanding and focused too narrowly in dismissing vague, ambiguous, or general allegations
 27 outright.”); *Lipton v. PathoGensis Corp.*, 284 F.3d 1027, 1037 (9th Cir. 2002) (sale following
 28 announcement not suspicious because defendant retained 98.6% of holdings and no other insiders sold).

22 ¹⁷ For this reason, *Vantive* and *Ronconi* (DB22) are unpersuasive. Additionally, in those cases, the
 23 defendants did not make sales shortly after the stock had reached its then highest peak, nor did the stock
 24 decrease immediately thereafter before steadily rising three months later, as here.

25 ¹⁸ While *Metzler Inv. GMBH v. Corinthian Colleges, Inc.* (DB23) involved the sale of a similar
 26 percentage of holdings (37%) as Pandey’s, those sales were not suspicious in timing and lacked
 27 corroborating insider sales, factors that are present here. 540 F.3d 1049 (9th Cir. 2008).

1 determine whether it was entered into in good faith. *Azar*, 2018 WL 6182756, at **18–19.¹⁹

2 **Williams:** Williams also *never sold any shares* prior to the Class Period yet unloaded
 3 600,000 stock options in only four trading days for over \$26.8 million in gross proceeds and nearly \$25
 4 million in profits. ¶¶368-69. This equates to the sale of 51.4% of Williams' vested and exercisable stock
 5 options through the date of his final Class Period sale, or approximately 25-29% of his total holdings
 6 (DB23), and profits of *seventy to one hundred times* his 2017 and 2018 salaries. ¶368-69. *Marksman*
 7 *Partners, L.P. v. Chantal Pharm. Corp.*, 927 F. Supp. 1297, 1313 (C.D. Cal. 1996) (“Twenty percent of
 8 a corporate insider’s shares, especially where the dollar amounts involved are high, may constitute a
 9 ‘suspicious amount’ sufficient to support a scienter allegation.”).

10 Williams’ sales were not made pursuant to a trading plan, and they were strategically timed to
 11 occur following the announcement of positive Q1 2018 and Q3 2018 earnings (¶¶369-70), at a time
 12 when he knew of Nutanix’s depleted pipeline. ¶370. *See In re Galena Biopharma, Inc. Secs. Litig.*, 117
 13 F. Supp. 3d 1145, 1167 (D. Or. 2015) (scienter found where sales “not made pursuant to a pre-arranged
 14 Rule 10b5-1 trading plan” and defendant had not sold in four years); *Intuitive Surgical*, 65 F. Supp. 3d
 15 at 838-39 (sales suspiciously timed where plaintiff alleged defendants sold at times they knew adverse
 16 information that would impact the price of the stock). Williams’ sales occurred just weeks after Nutanix
 17 was trading at a historical high. ¶371. Despite Defendants’ argument (DB24 n. 10), “the length of the
 18 Class Period in this case suggests . . . that Defendants were able to ride the wave of their misleading
 19 marketing for the entire Class Period.” *Questcor*, 2013 WL 5486762, at *15 & n.12. Thus, the timing
 20 and magnitude of William’s sales support an inference of scienter.²⁰

21 Defendants argument that the value of Williams’ decreased holdings does not negate scienter.
 22 *Sweeney*, 2012 WL 13026910, *2. Further, while Defendants argue that the percentage of Williams’
 23 holdings increased, they conveniently omit his options from their analysis. DB24. When both common

25 ¹⁹ Defendants’ cases (DB22) do not disagree, as those all specified the terms and dates of the plans.

26 ²⁰ Compare DB24 (citing *Vantive*, 283 F.3d 1079, 1094-96 (9th Cir. 2002) (sales not suspicious despite
 27 “substantial” percentage of stock sold where sales occurred prior to stock increase, were not inconsistent
 28 with prior trading, lacked comparative trading history, or amounted to lesser percentages of holdings
 than here); *In re Silicon Graphics Inc. Secs. Litig.*, 183 F.3d 970, 987 (9th Cir. 1999), superseded by
 statute on other grounds (sales comprised “insignificant portion of the allegedly suspicious sales,”
 lacked a prior trading history, or defendant was unable to make sales prior to class period); *Questcor*,
 2013 WL 5486762, at *15 & n.12 (*Yantive* more exacting than what *Tellabs* requires and *Yantive* decided
 “in part because the allegations did not support an inference of fraud throughout the class period.”)).

1 stock and options are considered, Williams' holdings dropped from 1,212,976 to 803,609 during the
 2 Class Period, an approximate 33% decline. That Williams did not sell on the same day as the historical
 3 high (DB24) is immaterial, as the shares were only sold between \$3.95 to \$5.57 less than the historical
 4 high. *Am. W. Hldg.*, 320 F.3d at 939 (stock sold three months after historical high and within \$5 of high
 5 price suspicious). *Questcor*, 2013 WL 5486762, at *17.²¹

6 **Motive to Inflate Stock to Conduct Public Offerings and Make Acquisitions:** As industry
 7 demand switched to cloud-based programs, Nutanix needed additional funds to engineer and launch Xi
 8 to compete (¶385), which were ultimately obtained through the January 2018 public offering, that raised
 9 net proceeds of \$564.2 million while Nutanix stock was artificially inflated. ¶384. Where, as here,
 10 defendants conduct a public offering to obtain much-needed capital, it is probative of motive. *In re
 11 MannKind Secs. Actions*, 835 F. Supp. 2d 797, 813 (C.D. Cal. 2011) (“allegation[s] that defendants were
 12 motivated to inflate artificially [the company’s] stock price...and obtain much-needed operating capital
 13 does allege facts of a palpable motive for fraud, as it goes beyond the generic desire to raise capital”).

14 Defendants were also motivated to artificially inflate Nutanix’s stock to complete the
 15 acquisitions of Netsil and Frame, two cloud-based companies, in March and August 2018, respectively.
 16 ¶¶378, 380. These acquisitions were critical for Nutanix to compete against VMWare and enabled it to
 17 remain compliant with the “Rule of 40,” a performance metric for technology startups that analysts use
 18 to evaluate the Company. ¶382. Williams frequently boasted about Nutanix’s compliance with the Rule
 19 of 40 and, had these acquisitions not occurred, Nutanix’s cash flow would have dropped to levels that
 20 violated the Rule of 40. ¶382. Accordingly, such motive is unique to Nutanix and stronger than the
 21 “generic motive” Defendants claim (DB24-25). *Daou Sy.*, 411 F.3d at 1023-24 (stock funded
 22 acquisitions probative of scienter); *In re Terayon Communications Systems, Inc.*, 2002 WL 989480, *10
 23 (N.D. Cal. 2002) (same).²²

24 CONCLUSION

25 Wherefore, Plaintiffs respectfully request that the Court deny Defendants’ Motion to Dismiss.²³

26
 27 ²¹ Suspiciously timed and sized non-defendant sales are probative of corporate scienter. ¶¶372-76.

28 ²² Because Plaintiffs plausibly allege primary violations, the control-person claim should be sustained.
See Intuitive Surgical, 65 F. Supp. 3d at 839.

²³ If the Court dismisses any portion of the AC, Plaintiff respectfully requests leave to amend. *Khoja*,
 899 F.3d at 1011.

1 Respectfully submitted,
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LEVI & KORSINSKY, LLP

4 /s/ Shannon L. Hopkins
5

Shannon L. Hopkins (admitted *pro hac vice*)
Stephanie A. Bartone (admitted *pro hac vice*)
Gregory M. Potrepka (admitted *pro hac vice*)
1111 Summer Street, Suite 403
Stamford, CT 06905
Tel: (203) 992-4523
Email: shopkins@zlk.com
Email: sbartone@zlk.com
Email: gpotrepka@zlk.com

6
7 Adam M. Apton (SBM 316506)
8 Adam C. McCall (SBN 302130)
9 388 Market Street, Suite 1300
10 San Francisco, CA 94111
11 Tel.: (415) 373-1671
12 Email: aahton@zlk.com
13 Email: amccall@zlk.com

14
15 *Lead Counsel for Plaintiffs and the Class*
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18
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